IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TRACY ANDERSON,

Plaintiff,

v.

WILLIAM POLLARD, Warden, CAPT. OLSON, SGT. DAHLKE, OFFICER LEVEY, OFFICER ROSENTHAL, and JAMES MUENCHOW,

Defendants.

OPINION & ORDER

13-cv-561-wmc

In this proposed civil action, plaintiff Tracy Anderson alleges that various officials at Waupun Correctional Institution ("WCI") violated his civil rights by taking and destroying his Holy Qur'an in violation of his First and Fourteenth Amendment rights. Anderson has been granted leave to proceed *in forma pauperis* and made an initial partial payment toward the filing fee. Because Anderson is incarcerated, however, the court must also screen his complaint pursuant to the Prison Litigation Reform Act ("PLRA") to determine whether it: (1) is frivolous or malicious; (2) fails to state a claim on which relief can be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A. After reviewing Anderson's pleadings, the court will allow him to proceed against certain defendants on the claim that they violated his rights under the Free Exercise Clause of the First Amendment and under the Due Process Clause of the Fourteenth Amendment. The court will also deny his motion for appointment of counsel (dkt. #11) without prejudice as to its later reconsideration.

ALLEGATIONS OF FACT[1]

In addressing any *pro se* litigant's complaint, the court must read the allegations generously and hold the complaint to "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 521 (1972). Anderson alleges, and the court assumes as true for purposes of this screening order, the following facts:

Plaintiff Terry Anderson is a Muslim presently confined at Waupun Correctional Institution ("WCI"). Defendant William Pollard is the warden at WCI and responsible for the overall administration and operations of WCI. Defendants Captain Olson, Sgt. Dahlke, Officer Levey and Officer Rosenthal are all employees at WCI. James Muenchow is an Institution Complaint Examiner (ICE) at WCI.

On May 16, 2013, Sgt. Levey came to segregation to confront Anderson about his property. Apparently, in segregation, there is a limit on the books and other property an inmate may possess. Levey informed Anderson that he had two choices: he could either send the extra books home, or they would be destroyed. Anderson stated that he would like to mail out his excess books. Apparently, his property, including his Holy Qur'an, was confiscated at this time and brought to the Property Department.

On June 14, 2013, Anderson was released from segregation, and on June 17, 2013, he received his property back, less some books that were considered contraband. At that time, Anderson noticed that his Holy Qur'an was not in the property that he received. That same day, Anderson filed an interview/information request asking for the return of his Holy

[1] Anderson has attached numerous exhibits to his complaint. The court considers these as part of the pleadings. Fed. R. Civ. P. 10(c).

Qur'an. On June 19, 2013, Anderson filed another interview/information request, which asked why his mother had still not received the excess property that he mailed out in May.

On June 20, 2013, Anderson was called to the Property Department, where he spoke with Sgt. Dahlke about his missing books. Anderson said that he had asked Levey to send his books out around May 15, but since that had not happened, he told Dahlke that he still wanted his property mailed out. On June 26, 2013, however, Dahlke called Anderson back to the Property Department and informed him that the property had been destroyed after being held for 30 days, including the Holy Qur'an that had been confiscated. Anderson then filed a complaint challenging the destruction of the Holy Qur'an.[2]

During the investigation, Levey was questioned and allegedly lied to Examiner Muenchow, stating that Anderson did not have any funds to send the property out when it was confiscated in May. Dahlke also allegedly lied, saying that by the time Anderson had funds, 30 days had already elapsed and his property had been destroyed. Based on these lies, as well as an allegedly inappropriate investigation, Examiner Muenchow rejected Anderson's complaint on July 30, 2013, despite all of the evidence demonstrating defendants' misconduct.

Anderson alleges that the confiscation and destruction of his Holy Qur'an caused him serious mental and physical pain, particularly because the defendants engaged in the conduct thirteen days before the month of Ramadan began. Specifically, Muslims believe they receive extra blessings for reading the Holy Qur'an in its entirety during Ramadan. Because his Holy Qur'an was destroyed by the defendants, Anderson was compelled to miss

[2] Anderson's complaint is dated June 20, 2013, but it references the June 26, 2013, meeting with Dahlke. The court, therefore, assumes that the June 20 date is in error.

those blessings throughout the month of Ramadan. Anderson seeks punitive damages in the amount of $250,000 from each of the defendants.

OPINION

In his pleadings, Anderson invokes various constitutional and statutory claims as a possible basis for recovery, which the court will address in turn.

I. Free Exercise Clause of the First Amendment

The Free Exercise Clause prohibits the government from placing a substantial burden on the observation of a central religious belief or practice absent a compelling governmental interest. *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). A substantial burden is "one that necessarily bears a direct, primary and fundamental responsibility for rendering religious exercise . . . effectively impracticable." *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003). Additionally, to find liability under the First Amendment, the religious exercise at issue must be "central" to the adherent's belief or practice. *Goodvine v. Swiekatowski*, 594 F. Supp. 2d 1049, 1056 (W.D. Wis. 2009).

Here, Anderson alleges that he is a Muslim. At least at the screening stage, the court will assume that reading the Qur'an is a religious exercise "central" to Anderson's faith. Like the Bible for Jews and Christians, the Qur'an (also called Noble Koran or Quran) is the central religious text of Islam, which Muslims believe to be revealed by God (Allah). Moreover, Anderson alleges that Muslims believe reading the whole Qur'an during the month of Ramadan grants them extra blessings. Because he alleges that his Qur'an was confiscated and ultimately destroyed thirteen days before Ramadan began, his exercise of

that particular belief was rendered impracticable. Therefore, Anderson has alleged sufficient facts to state a claim under the First Amendment Free Exercise Clause.

This is not, however, the end of the inquiry, since even a substantial burden on the right of religious exercise may not violate the First Amendment if it is "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). An inquiry under *Turner* involves considering four factors: (1) whether there is a "valid, rational connection" between the restriction and a legitimate governmental interest; (2) whether the prisoner retains alternatives for exercising the right; (3) the impact that accommodation of the right will have on prison administration; and (4) whether there are other ways that prison officials can achieve the same goals without encroaching on the right. *Id.* at 89-91. Generally, it is appropriate to wait until summary judgment to evaluate whether prison officials have adequately demonstrated a rational relationship to a legitimate penological interest. *See, e.g.*, *Lindell v. Frank*, 377 F.3d 655, 657-58 (7th Cir. 2004). While it is possible to imagine a legitimate penological interest for the confiscation and eventual destruction of property over the segregation limit, the court will not assume such an interest applies at the screening stage, in particular where the inmate's belongings are obviously central to his religious practice under the Free Exercise Clause.

Even so, Anderson may not proceed against *all* the defendants he names. Liability under 42 U.S.C. § 1983 requires *personal* involvement in the alleged constitutional deprivation. *Minix v. Canarecci*, 597 F.3d 824, 833 (7th Cir. 2010). Personal involvement requires either (1) direct involvement or (2) an official condoning or acquiescing in a subordinate's unconstitutional treatment of the plaintiff. *Id.* at 833-34. "A causal connection, or an affirmative link, between the misconduct complained of and the official

sued is necessary." *Koutnik v. Brown,* 351 F. Supp. 2d 871, 876 (W.D. Wis. 2004) (quoting *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir. 1983)).

Here, Anderson alleges that Levey was the one who initially confiscated his Holy Qur'an and that Levey refused to send it out, even though Anderson asked him to do so in mid-May. Likewise, Dahlke was allegedly informed that Anderson wished to send his property out to his family on or around June 20, but nevertheless destroyed the property, allegedly including the Holy Qur'an. Anderson has, therefore, alleged that both Levey and Dahlke were directly involved in placing a substantial burden on his observation of his religious practices.

Next, Anderson names Captain Olson. He alleges that Olson was informed many times of the "misconduct," which the court reads to mean both the failure to send the property to Anderson's family and its eventual destruction, but refused to take steps to protect Anderson's property. The exhibits that Anderson attaches appear to demonstrate that as early as May 15, 2013, he had informed Olson that he wished his property to be sent to his family, and that by June 17, 2013, he had asked for the return of his Holy Qur'an. On June 26, 2013, in response to Anderson's interview/information request informing Olson of the destruction of the property, Olson responded that property in general is held for 30 days and destroyed afterward. Thus, while it does not appear that Olson was necessarily *directly* involved in the property's destruction, the court may infer that he was aware of the deprivation and acquiesced in the other officers' behavior. Anderson may, therefore, proceed on a Free Exercise claim against Olson as well.

Anderson has also named Officer Rosenthal as a defendant, but he alleges no facts suggesting that Rosenthal was in any way involved in the confiscation and destruction of his

Holy Qur'an, either directly or by condoning a subordinate's behavior.[3] Therefore, Anderson may not proceed against Rosenthal.

Finally, Anderson names both James Muenchow, who investigated and dismissed Anderson's complaint against Levey, Dahlke and Olson, and William Pollard, who is the WCI warden and approved Muenchow's dismissal of the complaint. These actions do not demonstrate the required "causal connection" between the misconduct and the officials sued. The complaint was rejected as moot, since the disposal of the property in question occurred before Anderson filed his internal complaint. The court does not find that the rejection of a complaint on procedural grounds constitutes acquiescence in unconstitutional behavior, nor can it discern some causal link between Muenchow and Pollard's roles in the grievance process and confiscation and destruction of Anderson's Holy Qur'an. Their only part in the alleged harm came *after* the acts of which Anderson complains had already passed, and their handling of his grievance confirms that understanding. Accordingly, Anderson may not proceed with his claims against these defendants.

II. Religious Land Use and Institutionalized Persons Act

Claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA) closely track Free Exercise claims. Under RLUIPA, a plaintiff must establish that the defendant's challenged actions created a substantial burden on the exercise of his religious beliefs. *Meyer v. Teslik*, 411 F. Supp. 2d 983, 989 (W.D. Wis. 2006). If a plaintiff makes this showing, the burden shifts to the defendant, who must demonstrate that the decision

[3] It appears from the exhibits that Anderson submitted Rosenthal was the officer whose report initially resulted in Anderson's placement in segregation. This does not, however, demonstrate that Rosenthal was directly involved in a Free Exercise Clause violation.

was the "least restrictive means of furthering a compelling government interest." *Id.* Like Free Exercise claims, under RLUIPA, a "substantial burden" is "one that necessarily bears a direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." *Id.* (quoting *Civil Liberties for Urban Believers*, 342 F.3d at 761). A "religious exercise" under RLUIPA need not be central to a plaintiff's belief system; it is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A).

Because Anderson has stated a claim for relief under the Free Exercise clause, his claims likewise pass muster under the more permissive standard of RLUIPA, at least insofar as they relate to defendants Levey, Dahlke and Olson. The problem is that Anderson requests only compensatory and punitive damages -- that is, only monetary relief (Compl. (dkt. #1) 10), while RLUIPA only authorizes injunctive relief. *See Grayson v. Schuler*, 666 F.3d 450, 451 (7th Cir. 2012) (damages unavailable under RLUIPA because claims for damages against state actors in their official capacity are barred by sovereign immunity, while Act does not create a cause of action against state actors in their personal capacity); *Nelson v. Miller*, 570 F.3d 868, 883-89 (7th Cir. 2009). If Anderson wishes to amend his complaint to add a claim for injunctive relief under RLUIPA, he may do so; at this stage, however, he may not proceed under that statute.

III. Fourteenth Amendment

Anderson expressly invokes both the Equal Protection and the Due Process Clauses of the Fourteenth Amendment in his pleadings. As far as the Equal Protection Clause goes, Anderson has not stated a claim for relief, since he has not alleged that prison officials

discriminated against him *because* of his religion. Accordingly, he may not proceed with claims under that clause.

Anderson also invokes the Due Process Clause, but does not clearly indicate what due process rights defendants violated in this case. Presuming that Anderson intends to allege a deprivation of property pursuant to official prison policy under the Fourteenth Amendment, the court must determine whether he had a protected property interest in his Holy Qur'an, and whether he was deprived of that property without due process of law. *See Caldwell v. Miller*, 790 F.2d 589, 608 (7th Cir. 1986).

The court accepts that Anderson had a property interest in his Holy Qur'an. *Cf. id.* ("It is beyond dispute that Caldwell had a property interest in his hardbound books [that were confiscated during a prison lockdown.]"); *Kimbrough v. O'Neil*, 545 F.2d 1059 (7th Cir. 1976) (en banc) (prisoner had stated a claim under the Fourteenth Amendment when a county jail deputy took a ring from him and did not return it upon transfer to federal custody). But this still leaves the question whether Anderson was afforded due process of law.

Anderson has alleged -- and the court accepts as true for purposes of screening -- that prison officials refused to ship his Holy Qur'an to his family on the pretense that he lacked the funds to do so, even though (at least according to Anderson) he *did* have funds in his account. This is enough at screening to state a claim for deprivation of property without due process in violation of the Fourteenth Amendment. *See Caldwell*, 790 F.2d at 609 (possibility that refusal to allow prisoner to send his confiscated books to friends violated due process; record was not clear as to whether prison officials' actions "rested upon considerations of how best to administrate a corrections facility"); *cf. Neal v. Lewis*, 325 F.

Supp. 2d 1231, 1238 (D. Kan. 2004) (no due process violation when prisoner was offered option to mail out excess property, among other options, and refused to choose, so that his property was eventually destroyed).

IV. First Amendment Retaliation

Finally, Anderson alleges, if somewhat obliquely, that the confiscation and destruction of his Holy Qur'an were acts taken in retaliation for letters he wrote making derogatory and disrespectful comments about white people, certain black people and correctional staff. (*See* Compl. Exh. 1 (dkt. #1-1) 1.) A claim for retaliation under the First Amendment requires that a prisoner ultimately show "that (1) he engaged in activity protected by the First Amendment; (2) he suffered a deprivation that would likely deter First Amendment activity in the future; and (3) the First Amendment activity was 'at least a motivating factor' in the Defendants' decision to take the retaliatory action." *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009). A prisoner's speech can be protected even when it does not involve a matter of public concern. *Id.* at 551. All that is required is that it pass the test set forth in *Turner v. Safley*, 482 U.S. 78 (1987), which asks whether the restriction on the speech is reasonably related to a legitimate penological interest. *Id.* at 89. An act of speech that violates legitimate prison rules cannot form the basis for a free speech retaliation claim. *Watkins v. Kasper*, 599 F.3d 791, 799 (7th Cir. 2010).

Based on the exhibits Anderson has attached to his complaint, it appears that what he wrote did not technically violate prison regulations, since the letters were sent to "other individuals," not staff members. (*See* Compl. Exhs. (dkt. #1-3) 6 (warden's decision reversing Anderson's punishment).) Based on the incident report Anderson has submitted,

however, it appears that the letters in question contained disrespectful and insulting language, some of it race-based. (*See* Compl. Exh. 1 (dkt. #1-1) 1-2.) The Seventh Circuit has held that "the need for obedience in prisons justifies reasonable limitations on disrespectful language." *Felton v. Huibregtse*, 525 Fed. App'x 484, 487 (7th Cir. 2013); *see also Ustrask v. Fairman*, 781 F.2d 573, 580 (7th Cir. 1986) ("We can imagine few things more inimical to prison discipline than allowing prisoners to abuse guards and each other."). Anderson has neither attached copies of his actual letters, nor alleged any facts suggesting that they contained content that *was* protected speech. All that he has alleged is having written letters, with his exhibits detailing only their disrespectful content. Accordingly, Anderson has not alleged enough facts to make it plausible that he engaged in the kind of protected activity that might give rise to a claim for retaliation under the First Amendment.[4]

V. Motion for Appointment of Counsel

Anderson also asks the court to issue an order appointing counsel to represent him in this lawsuit. (Dkt. #11.)[5] As a preliminary matter, Anderson should be aware that civil litigants have no constitutional or statutory right to appointment of counsel. *E.g.*, *Ray v. Wexford Health Sources, Inc.*, 706 F.3d 864, 866 (7th Cir. 2013); *Luttrell v. Nickel*, 129 F.3d

[4] Admittedly, the present complaint lacks the more straightforward outcome of *Watkins*, since Anderson's ultimate punishment for "disrespect" was in fact overturned during the due process he was afforded by the prison's internal procedures. Moreover, he includes no other details about the letters at all -- all the court has is the conduct report quoting some of the problematic passages, including calling people "Uncle Toms," "crackers" and "devils." Without more than this, plaintiff does not show more than a "sheer possibility" that the defendants acted in retaliation for protected conduct, which is not enough to make his claim for relief plausible.

[5] Anderson's motion actually focuses on the Eighth Amendment claims in his other pending civil lawsuit before this court. His caption indicates it applies in both of his cases, however, and so the court considers it in this case as well.

933, 936 (7th Cir. 1997). The court may, however, exercise its discretion in determining whether to recruit counsel *pro bono* to assist an eligible plaintiff who proceeds under the federal *in forma pauperis* statute. *See* 28 U.S.C. § 1915(e)(1) ("The court may request an attorney to represent an indigent civil litigant *pro bono publico.*"); *Luttrell*, 129 F.3d at 936. Thus, the court cannot issue an order appointing counsel to assist Anderson; it merely has the discretion to recruit a volunteer in an appropriate case. Accordingly, this court will construe Anderson's motion to appoint counsel as one seeking the court's assistance in recruiting a volunteer under 28 U.S.C. § 1915(e)(1).

Before a court seeks a volunteer, it is necessary that Anderson show that he has made reasonable efforts to find a lawyer on his own and that he has been unsuccessful or was prevented from making such efforts. *Jackson v. County of McLean*, 953 F.2d 1070, 1073 (7th Cir. 1992). Generally, this court requires the names and addresses of three lawyers whom plaintiff has asked to represent him and who have turned him down. Anderson has included rejection letters from two law firms with his motion, and so he has technically not yet met this threshold requirement. (*See* Mot. for Assistance in Recruiting Counsel Exh. 1 (dkt. #11-1).) Even if he had, however, the court would decline to exercise its discretion to seek out a volunteer at this stage of the lawsuit.

The relevant question in determining whether it is appropriate to seek volunteer counsel is "whether the difficulty of the case – factually and legally – exceeds the particular plaintiff's capacity as a layperson to coherently present it to the judge or jury himself." *Pruitt v. Mote*, 503 F.3d 647, 655 (7th Cir. 2007). Thus far, Anderson has demonstrated that he is capable of litigating this case on his own. He has assembled the records surrounding his claims without the aid of counsel. His pleadings are neat and

comprehensible, with citations to relevant case law. At this stage, the court does not believe that this case exceeds Anderson's capacity to litigate himself.

Still, this denial is without prejudice to later reconsideration. Defendants have not even been served yet. If, in the course of litigation, it becomes clear that the case *does* exceed Anderson's capacity to present it to the court *pro se*, he may renew his motion at that time, explaining the circumstances that make this particular case too complex for him to litigate on his own.

ORDER

IT IS ORDERED that:

1) Plaintiff Tracy Anderson is GRANTED leave to proceed on the following claims:

   (a) his Free Exercise claim against defendants Sgt. Dahlke, Officer Levey and Captain Olson; and

   (b) his Due Process claim against defendants Dahlke, Levey and Olson.

2) Plaintiff is DENIED leave to proceed on all other claims.

3) Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have forty (40) days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.

4) For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing defendants, he should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to defendants or to defendants' attorney.

5) Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

6) Plaintiff's motion for appointment of counsel (dkt. #11) is DENIED without prejudice as to later reconsideration.

Entered this 14th day of January, 2014.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge